

1 **MOT**

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Attorneys for Defendant Target Corporation

7 **UNITED STATES DISTRICT COURT**

8 **DISTRICT OF NEVADA**

9 MARSHA ELLIOTT, individually,

CASE NO: 2:11-cv-01215-JCM-RJJ

10 Plaintiff,

11 v.

12 TARGET CORPORATION, a Minnesota
13 Corporation d/b/a TARGET; DOES I through X and
14 ROE CORPORATIONS I through X, inclusive,

15 Defendants.

16 **DEFENDANT TARGET CORPORATION'S FRCP 35 MOTION FOR PHYSICAL**
17 **EXAMINATION OF PLAINTIFF MARSHA ELLIOT ON AN ORDER SHORTENING**
18 **TIME**

19 COMES NOW defendant TARGET CORPORATION, by and through their attorneys
20 WILSON, ELSE, MOSKOWITZ, EDELMAN & DICKER LLP. and serve this motion, asking this
21 Honorable Court to order plaintiff MARSHA ELLIOT to appear for (1) a physical examination by
22 Dr. Morton Hyson in the above-entitled action.

23 This motion is made and based on FRCP 35; as well as all papers and pleadings on file herein
24 and such argument of counsel as the Court may allow at the time of hearing.

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1 DATED this 13th day of April, 2012.

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3 **WILSON, ELSE, MOSKOWITZ, EDELMAN
& DICKER LLP**

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5 BY: 

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10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. FACTUAL SUMMARY**

12 This matter stems from an incident that took place on or about September 28, 2009 at a
13 Target Store in Las Vegas, Nevada. The plaintiff alleges that she arrived at the Target located at
14 3210 N. Tenaya Way, Las Vegas, Nevada, on September 28, 2009. The claimant alleges that she
15 walked to the Home Improvement section of the store to purchase a mop hanger. As she was pulling
16 the hanger off the display, a wire rack, that was for sale, slid off the display and landed on her foot.
17 She is claiming to have suffered a compression of a nerve in her foot which has resulted in a wage
18 loss and medical bills.

19 Specifically, the plaintiff is claiming because of Defendant's negligence, she required
20 medical treatment and surgery. She further alleges injuries that have resulted in pain, suffering,
21 impairment, disability in excess of \$50,000.00. Plaintiff is also claiming loss of income and
22 emotional distress.

23 **II. PROCEDURAL HISTORY**

24 Plaintiff filed her Complaint on April 19, 2011 in the 8th Judicial District Court, Clark
25 County Nevada. On July 27, 2011, Defendant removed this matter to United States District Court
26 for the District of Nevada. On August 29, 2011, a Stipulated Discovery Plan and scheduling Order
27 were filed. The plan was granted on September 2, 2011. On October 24, 2011, Target propounded a
28 First Set of Interrogatories, a First Request for Production, and a First Request for Admissions on
Plaintiff. Plaintiff did not timely respond to all written discovery, and Defendant filed a Motion to

1 Compel Discovery Response. On February 27, 2012, this court granted Defendant's Motion to
2 Compel and granted sanctions against Plaintiff for late discovery responses.

3 Defendant now brings this motion for physical examination of Plaintiff pursuant to FRCP
4 35, as the physical condition of Plaintiff is in controversy in this matter.

5 **III. LEGAL ANALYSIS**

6 FRCP 35(a) provides in pertinent part as follows:

7 **a) ORDER FOR AN EXAMINATION.**

8 (1) *In General.* The court where the action is pending may order a party whose mental or
9 physical condition—including blood group—is in controversy to submit to a physical or mental
examination by a suitably licensed or certified examiner. The court has the same authority to order
a party to produce for examination a person who is in its custody or under its legal control.

10 (2) *Motion and Notice; Contents of the Order.* The order:

11 (A) may be made only on motion for good cause and on notice to all parties and the person to
12 be examined; and

13 (B) must specify the time, place, manner, conditions, and scope of the examination, as well
14 as the person or persons who will perform it.

15 **The physical condition of the plaintiff is in controversy.** Here, Plaintiff is claiming
16 (among other things) as a result of the alleged negligence of Defendant claiming to have suffered a
compression of a nerve in her foot which has resulted in a wage loss and medical bills.

17 **Dr. Hyson** will take a complete physical and history from Plaintiff. In addition, Dr. Hyson, a
18 neurologist, will perform a complete physical examination. Time permitting, Dr. Hyson will also
19 perform nerve conduction studies.

20 Therefore, because plaintiff is alleging physical (neurological) impairments, there is good
21 cause for Target Corporation to request that Plaintiff undergo an IME. Further, plaintiff has been
22 provided with sufficient notice of the time, location, manner and scope of said examinations.

23 As a result, request is made that this honorable Court order plaintiff to appear for her
24 scheduled IME on May 1, 2012.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, Defendant TARGET CORPORATION requests this honorable
3 Court grant this motion and order plaintiff to appear for his scheduled IME on May 1, 2012.

4 DATED this 13 day of April, 2012.

5 IT IS SO ORDERED.

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8 Robert Johnston
U.S. Magistrate Judge

9 Date: May 15, 2012

**WILSON, ELSER, MOSKOWITZ, EDELMAN
& DICKER LLP**

BY: [Signature]

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12 **CERTIFICATE OF SERVICE**

13 Pursuant to FRCP 5(b), I certify that I am an employee of WILSON, ELSER,
14 MOSKOWITZ, EDELMAN & DICKER LLP and that on this 13 day of April, 2012 I
15 electronically filed and served a true and correct copy of the foregoing **DEFENDANT TARGET**
16 **CORPORATION'S FRCP 35 MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF**
17 **MARSHA ELLIOT ON AN ORDER SHORTENING TIME** to all parties on file with the
18 CM/ECF.

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27 An Employee of
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